No. 3200

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

XAVIER SERVEL,
Plaintiff in Error.

vs.

G. R. JAMIESON AND MATTHIESON MURRAY,
A Co-partnership Doing Business Under the Firm
Name of Jamieson & Murray,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

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.....Clerk.

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ARGUMENT

A.

The argument of defendants in error will follow generally the sequence of the argument of plaintiff in error as found in his brief. It is insisted that defendants did have the right to declare the contract forfeited and refuse to make delivery of the sheep in question

to plaintiff after the day fixed in the contract therefor, under the circumstances of this case.

It is admitted that in ordinary contracts for sale of sheep time is never deemed of the essence of a contract unless expressly so provided. The contract in the instant case, however, provides:

> "And it is further mutually agreed by and between the parties hereto that time is of the essence of this agreement and that upon the expiration of the time for delivery as herein provided the rights of said party of the second part hereunder shall cease and determine, and he shall have no right, claim or interest in or to said sheep after the expiration of said period of time."

Under the foregoing provision of the contract, time having deliberately been made of the essence of the contract, the parties thereto must, in the absence of waiver or estoppel, expect that the provision will be given full force and effect

> *Pratt vs. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700.

It seems, therefore, that the defendants were justified in treating the plaintiff's rights as terminated upon his failure to tender the purchase price within the time limited.

Our attention will be next directed to the three propositions upon which plaintiff in error relies to sustain his contention that defendants were not justified in treating the plaintiff as in substantial breach,

and therefore justified in regarding the plaintiff's rights under the contract as forfeited.

I. Plaintiff contends that any forfeiture of the contract in question as sought to be made by defendants under the circumstances of this case would be manifestly unfair and unconscionable and should not be permitted.

Argument of plaintiff opens with the statement that he sent his representative, C. M. Sitt, to the place at which delivery was to be made. Attention of the court is called to the fact that, while defendants at no time required further credentials as to the rights of Mr. Stitt to demand the delivery of these sheep, nevertheless the record discloses that the plaintiff testified that he sent Mr. Stitt for the sheep purchased and that when Mr. Stitt appeared he claimed these sheep as the purchaser from a third party, Hatcher & Snyder of Denver, Colorado. If defendants on the record of this case may be regarded as having accepted Mr. Stitt as one authorized to receive these sheep, it is respectfully submitted that defendants had an equal right to insist that upon the delivery of these sheep payment therefor should be had and made in legal tender. A stranger to the contract from a sister state ought in the exercise of reasonable care to be dealt with fairly but at arm's length. Representations that the money is at some place in a sister state is placing the money at too great

a distance from the place where the sheep were to be delivered and payment was to be made to require defendants in equity and good conscience to have accepted the personal check or draft of Mr. Stitt. Neither do we see that a guaranty by a bank of a sister state that payment of such check would be made entitled plaintiff to require defendants to accept such check in lieu of legal tender.

It is immaterial that many or most private business obligations are conducted upon a credit basis by means of checks and drafts because the law entitles obligees for the payment of certain sums to demand that payment be made in legal tender and the fact that they frequently waive such right in no way affects their legal right in reference thereto, particularly when the transaction is had with a stranger from a sister state and third and fourth parties are introduced who were strangers to the original transaction. It might be observed at this time that on motion by defendants for a nonsuit on such a record as is before this tribunal the plaintiff has had every opportunity to put his best foot forward and a careful scrutiny of this record will disclose that this plaintiff has availed himself of every such opportunity.

By the terms of the contract, delivery of the sheep in question was to be made "between the 25th day of September, 1917, and the 29th day of September, 1917, the exact date to be at the option of said party of the second part, * * * and said party of the second part

will pay the remainder of the purchase price of said wether sheep at the time and upon the delivery thereof to said party of the second part by said parties of the first part." No tender of payment was made by Mr. Stitt before the afternoon of Saturday, September 29, 1917, and the court gave notice to plaintiff in the course of the trial that it would take judicial notice of the fact that you cannot get money from Fort Morgan, Colorado, over Saturday noon. It was upon a bank at Fort Morgan, Colorado, that Stitt offered defendants his check.

The record discloses that neither plaintiff nor Mr. Stitt had taken the care or trouble to have this money within reasonable proximity at the time and place of payment. Neither does it appear that defendants had any notice that they would be expected to accept Mr. Stitt's personal check upon a bank located at Fort Morgan, Colorado, on the last day of performance when the sheep were about to be loaded in cars. We do not see that it is material that defendants accepted, at the time of entering into the contract, a check in earnest to bind the bargain inasmuch as they did at that time and were intended to have for a reasonable time thereafter the possession of the sheep contracted for as security.

It is admitted that forfeitures are generally not favored but it can hardly be said that they will not be enforced where by the breach of the contract a party thereto is by the express terms of the contract

entitled to claim a forfeiture. In this connection plaintiff has directed us to the following authorities:

Fratt vs. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700;

Cook-Reynolds Co. v. Chipman, 47 Mont. 289, 133 Pac. 694;

Suburban Homes Co. v. North, 50 Mont. 108, 145 Pac. 2.

It will be noted that these cases revolve about section 6039, Revised Codes, Montana (section 3275, C. C. Cal.), which is as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party except in case of a grossly negligent, wilfull, or fraudulent breach of duty."

Fratt vs. Daniels-Jones Co., supra, certainly establishes the principle in the courts of Montana that neither the provision "time is of the essence of this contract" nor the contract containing such a provision is invalid as against positive law or public policy and that when this provision is inserted in contracts, "it is the duty of courts to carry out the intention of the parties by giving effect to that provision," citing

Cheeney v. Libby, 134 U. S. 68, 33 L. Ed. 818, and quoting from the latter case the following:

> "However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and, therefore, a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves."

The court in the Fratt case further says of section 6039, R. C., supra:

> "Whatever may be the correct interpretation of the language of that section, this much is apparent; the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity."

The court proceeds and cites with approval the case of Cook-Reynolds Co. vs. Chipman, supra. In Suburban Homes Co. v. North, supra, the court also cites both the Cook-Reynolds and the Fratt cases and says:

> "In order to avoid the consequences of his default, we can see no reason why the defendant should not be required to bring himself within the equity of the statute as interpreted in Cook-Reynolds vs. Chipman, Fratt vs. Daniels-Jones Co., supra, and other cases cited supra."

In Cook-Reynolds vs. Chipman, supra, the court says, where the court was considering a loss by the purchaser in the nature of a forfeiture authorized by the terms of the contract:

> "From such a loss he may be relieved upon showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, wilful or fraudulent."

Plaintiff apparently overlooked the important decision of

Clifton vs. Willson, 47 Mont. 305, 132 Pac. 424,

in reference to his contention which he seeks to sustain by the authority of the above cases.

In the Willson case the plaintiff was suing to recover damages for a breach of a contract to deliver sheep. It was conceded that plaintiff refused to accept the sheep because they were not of the character specified in the contract. The defendant counterclaimed that he offered to deliver the ewes which were not accepted. The court carefully analyzes the seller's right both at common law and under the Code provisions of this state insofar as they may modify or declare common law principles. After an analysis of the common law principle which seeks to compel parties to live up to their agreements and not encourage them in the violation thereof, in consequence of which principle it is generally held that one who is guilty of a breach of his contract by stopping short of full performance cannot recover payments made prior to the breach, the court concludes by saying in reference to section 6039, R. C., supra:

> "The statute has no application to a case where, as in this case, the plaintiff seeks to recover damages for a breach by the defendant. While he is sueing to recover his advance payments as a part of the compensation to him, the plaintiff assumes to stand strictly upon his legal rights—risking his chance of ultimate recovery exclusively upon his alleged ability to

> show that his loss has been due to defendant's failure to deliver the ewes according to his agreement."

The plaintiff in the instant case stands squarely within the construction of the statute by the Montana Supreme Court, he obviously standing upon a cause of action for an alleged breach of contract and is seeking to recover his advance payment as a part of the compensation to him for the alleged breach.

Concerning the charge of fraud and trickery at the conclusion of plaintiff's argument of this part of his brief, we wish merely to direct the court's attention to the record itself and respectfully submit that the record does not bear out the charge that is made in plaintiff's brief nor does it contain any evidence whatsoever that defendants perpetrated fraud or trickery or proposed to send Mr. Stitt upon any fruitless chase whereby the time between noon and the closing of the banks was consumed. Mr. Stitt arrived at Nashua between two and two-thirty, Saturday afternoon, September 29th, took dinner and returned to Glasgow between four and four-thirty the same afternoon. Not only does the evidence fail to disclose fraud, but it appears therefrom that the whole time consumed by Mr. Stitt on this "fruitless chase" was no more than two hours and that during this time he procured his dinner. Concerning the suspicion of plaintiff arising from the fact that "not one word was said by either of the defendants to plaintiff or Mr. Stitt about legal tender until after the banks were closed upon Saturday,

the 29th day of September," plaintiff was either under a legal obligation to tender defendants money or he was not under such an obligation. If it be admitted that plaintiff was under a legal obligation to tender money, then plaintiff is reduced to the contention that it is obligatory upon defendants to notify plaintiff of a legal obligation which he has bound himself to perform and of which he must therefore have notice. If plaintiff was not under a legal obligation to tender money, notice by defendants to tender money would avail nothing. We confess our inability to see anything in this point raised by plaintiff and presume, in the absence of any citation of authority by him that he was unable to find authority supporting his contention.

II. As to plaintiff's contention that his offer of performance was substantial and such as was contemplated by the parties at the time of making the contract, and was, therefore, sufficient upon which to base an action to recover thereon, the defendants take issue.

Neither can defendants admit that where one has offered to make payment of an obligation to pay a determinable amount upon a fixed time that a tender of a check is a substantial performance of the obligation even though it is recognized as a customary and usual method of payment, where the obligor is informed at the time of tender that the check will not be accepted and that money is demanded and where time is of the essence of the contract and an offer to procure legal

tender money just as soon as it can be transmitted from a point distant in a sister state, does not cure the obligor's breach in failure to tender current money within the time fixed. The whole trouble with plaintiff's case is that he has not in good faith substantially performed his obligation to pay that medium which the law requires of him for the payment of these sheep.

Plaintiff quotes and relies upon the case of

Shaeffer v. Coldren (Pa.) 85 Atl. 98.

While the quotation from this case in plaintiff's brief has no bearing whatever on the material issues of the instant case, the court's attention is invited to the following facts in that case: (1) Coldren was to come to Bellefront on Saturday to close the transaction; (2) the parties had agreed that the obligor should tender a certified check for the cash payment on that day; (3) Coldren did not appear in Bellefront on the day appointed; (4) When Coldren failed to appear on the day agreed upon the obligor drove out into the country, a distance of several miles, to tender the performance of his part of the contract in order to exercise his option. Coldren, the seller, had agreed to accept the certified check and did not at any time insist upon a tender in money. Upon a tender by the obligor no objection was made to the tender of a check. That case, therefore, has no bearing on the issues involved herein. We agree with plaintiff that "in the absence of any provision in the contract, or of any circumstances excluding it, contracts for the payment of

money refer to the ordinary and usual currency in which business is transacted." Currency, when applied to the medium of trade means coin, bank notes or notes issued by the government.

2 Words & Phrases, 1789.

Fabbri vs. Kalbfelisch, 52 N. Y. 28, is cited and quoted by plaintiff and is an authority directly against the position he cited it for.

Hendry v. Benlisa (Fla.) 20 So. 800, involved the question whether a judgment obtained during the Civil War which has been paid in confederate money and accepted must be regarded as settled. The complete sentence from which plaintiff has detached a part, is as follows:

> "No court, since the war, has held, so far as we know, that confederate treasury notes were issued by lawful authority; but 'money' has been recognized generally by the courts as a generic term, covering anything that by consent is made to represent property, and pass as such in current business transactions, and that when a judgment or debt has been paid in confederate money, and accepted, the transaction must be regarded as settled and cannot be opened."

Curiously enough, in considering U. B. Blalock & Co. vs. W. D. Clark & Bros. (N. C.) 49 S. E. 88, plaintiff quotes from an instruction to the jury to which there was no exception. The instruction excepted to was in the following words:

"If the contract was made, and the plaintiff

> came within a reasonable time, and was then ready and able to pay the cash, or, if not ready to pay the cash, and if the jury find by a preponderance of the evidence that there was a well known and established custom among persons in that section, embracing Troy, who bought and sold cotton in large lots, to pay in valid checks, or to ship with bill of lading attached to sight draft, and the plaintiff was ready to comply with this custom, and the defendant did not demand the cash, but refused to deliver the cotton because the price had advanced and because of delay, then he would be entitled to damages, if the demand for the cotton was made within a reasonable time after 8th February."

Plaintiff cites and quotes section 5044, R. C. Montana. This section is identical with section 1655, California C. C.

In Burns v. Sennett, 33 Pac. 916, page 919, the Supreme Court of California, citing section 1655 supra, says:

> "A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms; but it has a legitimate office in aiding to interpret the intentions of parties to a contract, the real character of which is to be ascertained, not from express stipulations, but from general implications and presumptions."

Section 7887, R. C. Montana, provides that evidence may be given upon a trial of the

> "Usage, to explain the true character of an act, contract or instrument, where such true

character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation."

Section 8060, R. C. Montana, provides:

"In this state there is no common law in any case where the law is declared by the Code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision." (See also Sec. 3552 R. C. Mont.)

Evidence of usage or custom is inadmissible, in

"That it was an attempt, under the guise of explaining language used in the contract, to ingraft upon it a new provision upon which to base a substantial defense; and that, of course, is not permissible, certainly when the usage or custom is not relied on in the pleadings."
Charles Syer & Co. v. Lester (Va.) 82 S. E. 122.

As we shall subsequently show, where the contract does not provide the character of money or currency in which payment is to be made, payment must be made in any currency which constitutes a legal tender at the time of payment. This is a substantive rule of law. There is no express provision in the contract as to the medium of payment. Therefore the common law rule is applicable.

"A usage in conflict with plain, well established rules of law, is inadmissible in evidence in any case, and must be disregarded. We may be permitted to add the remark that were the

courts, by their decisions, to encourage the growth of these local usages, originating generally in lax business practice, or mistaken ideas of law, they might become as great an evil and source of as much want of uniformity in the law as was the local legislation of the past—an evil supposed to be eradicated from our political system by the new constitution."

Cox v. O'Riley, 4 Ind. 368, 58 Am. Dec. 663.

"The rule admitting evidence of the usage is always subject to this limitation, however, that proof will never be allowed to establish a usage which is repugnant to, or which controls, displaces, or alters the legal effect of any of the express terms of a contract. A usage cannot be appealed to for the purpose of eliminating terms from a contract, and in grafting upon it others different from or inconsistent with those displaced; nor will proof be heard of a usage that is contrary to public policy or good morals or to the common or statute law."

Van Camp Packing Co. v. Hartman (Ind.) 25 N. E. 901.

"A custom cannot contradict the plain and unambiguous terms of a contract, or control its legal effect. It follows, therefore, that proof of a custom will not be received when in conflict with well settled rules of law."

High Wheel Auto Parts Co. v. Journal Co. (Ind. App.) 98 N. E. 442.

These principles announced and followed by the courts of Indiana are in accord with the universal holdings

of our courts, and are sustained by the following authorities:

Barnard v. Kellogg, 177 U. S. (10 Wallace) 383, 19 L. Ed. 987;

Vermilye v. Adams Express Co., 88 U. S. (21 Wallace) 138, 22 L. Ed. 609;

Clark v. Allaman (Kan.) 80 Pac. 571;

Homer v. Door, 10 Mass. 26;

Pickering v. Well (Mass.) 34 N. E. 1081;

Thomas v. Guaranty Title & Trust Co. (Ohio) 91 N. E. 183, 26 L. R. A. (n. s.) 1210.

In Barnard v. Kellogg, supra, the Supreme Court of the United States said:

> "But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. See notes to *Wigglesworth v. Dallison,* 1 Smith's L. Cas. 670, (Doug. 200);
>
> 2 Pars., Cont., sec. 9, p. 535;
>
> Taylor, Ev., p. 943, and following.
>
> 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' *Brackett v. Royal Exch. Ass. Co.,* 2 Cromp. & J., 249.
>
> And it is well settled that usage cannot be allowed to subvert the settled rules of law. See note to Smith's L. Cases, supra. Whatever tends to unsettle the law and make it different in the different communities into which the State is

> divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made."

We entertain no doubt of the correctness of the court's ruling in the Blalock case cited by plaintiff and we do not see wherein that case in any wise aids the plaintiff's appeal.

The fact that defendants accepted a check upon a Utah bank given by the plaintiff upon the execution of the contract has no bearing whatever upon defendant's refusal to accept the personal check of Mr. Stitt upon parting with the sheep for the remainder of the purchase price in a sum approximately ten times the amount of the original check, particularly in view of the fact that defendants retained possession of the sheep and for considerable time after receipt of the check given in earnest to bind the bargain. As a general principle, we agree with the plaintiff that courts will construe a contract as the parties thereto have construed it and Mr. Stitt, though the record discloses that he claims the right to the sheep by virtue of a purchase from strangers to the contract, Hatcher & Snyder, may nevertheless probably be entitled to whatever benefit the plaintiff sees in this principle. We agree also that the law does not require a party to do an idle and useless thing and therefore insist that it is

immaterial whether defendants advised plaintiff that they would not accept legal tender after the time fixed for payment had expired, except to negative any waiver on their part.

Plaintiff cites a long list of authorities to sustain the proposition that if a debtor is ready, able and willing to pay, the actual production of it may be waived by the absolute refusal of the creditor to accept it. No one would doubt this general proposition.

We cannot agree with plaintiff that "an offer to perform is equivalent to performance for the purpose of sustaining an action for damages." It is precisely on this proposition that plaintiff has failed in understanding the law applicable to this case. What the court held in the case of

Lehrkind v. McDonnell, 51 Mont. 343, 153 Pac. 1012, was:

> "An unconditional offer in good faith to perform, by the party upon whom the obligation rests, coupled with the ability to perform if rejected by the other party, is equivalent to full performance and extinguishes the obligation as to the party making offer
>
> (Rev. Codes, sections 49229, 4937, 4938, 4939.)"

III. Plaintiff did not tender payment within the time and in the manner contemplated by the contract.

Delivery of these sheep was to be made on Porcupine Creek, above Nashua, Montana, and at the town of Saco, Montana, and upon the delivery of the sheep

payment was, by the terms of the contract, to be made. In regard to the contention by plaintiff that payment by legal tender would be an unusual method of payment and that it would be deemed foolhardy and unbusinesslike for any person to carry with him approximately $30,000, as was involved in this transaction, it is submitted that representations by the plaintiff or Mr. Stitt or any other person that Mr. Stitt's personal check in the sum of approximately $30,000 would be paid by the bank upon which it was drawn located at Fort Morgan, Colorado, are not in themselves sufficient to bind these defendants to accept the check so tendered. It does not appear that a bank at Saco or Nashua or at Glasgow, where tender of the check of Mr. Stitt was made, had sufficient funds on hand to have paid this check. At least Mr. Stitt should have advanced this money and deposited it in a bank immediately available when the time for payment arrived. He did not even offer a certified check to defendants. It is immaterial that delay in making legal tender "was due to the act of defendants in asking and demanding of plaintiff that he do something which had not been anticipated by plaintiff" if plaintiff was legally bound to do that something. And it makes no difference that plaintiff expected to do something different than he was legally bound to do.

We do not doubt that if a party prevents performance of a contract by the other party thereto he cannot insist on the stipulation that time is of the

essence; and the grantor of an option who prevents its exercise during the time limited, must give a reasonable time for its exercise after any obstruction that he has interposed is removed. The answer to this is that defendants interposed no obstruction to the payment of the purchase price in the instant case; neither did defendants prevent performance by the plaintiff within the time limited, and therefore the long list of authorities cited by plaintiff, while they may probably sustain the foregoing proposition, do not bear on the issues of this case. Neither has there been any act of waiver on the part of these defendants. It would be difficult to conceive more direct straightforward action on the part of these defendants evincing at all times an intent on their part to stand firmly upon the contract. Neither do we doubt that a payment or tender of payment by check is sufficient unless objection is made to the tender on the ground that it is not acceptable tender. For the proposition that if party makes tender of check, without notice that legal tender money will be required, and such check is refused, party should have opportunity of securing the money and making a good and valid tender, plaintiff cites

> *McGrath v. Gegnor* (Md. App.) 26 Atl. 502; *Shaeffer v. Coldren,* heretofore noticed; and *Sharpe v. Todd,* 38 N. J. Eq. 324.

In McGrath vs. Gegnor, supra, the tender made

by check was refused because the obligee had declared the contract to be at an end and the court held,

> "The tender thus made and refused will be considered in law a lawful tender; and for the reason that all objection to the character of the tender will be considered as having been waived; and for the further reason that, if objection had been made on the ground that the tender was not made in lawful money, the party would have had the opportunity of getting the money and of making a good and valid tender."

In connection with the last reason, it will be noted that these parties had been in the habit of making payment for their weekly delivery by check, which method of payment seems to have been usually acceptable; nor was time of payment of the essence.

Sharpe v. Todd, supra, merely holds that where one is bound to pay a mortgage on demand or within a reasonable time thereafter, on a demand under the circumstances of that case the party on whom the demand is made is entitled to a reasonable time in which to get the money. We do not see that the case is in point.

The court can hardly take "judicial notice of the fact that comparative few obligations are met by the payment of legal tender, practically all of the business of the country being conducted upon a credit basis by means of checks and drafts," because the statement is not true in regard to business transactions between strangers. If the court may take judicial notice of a

considerable use of checks and drafts in business transactions, it is submitted that it ought also to take judicial notice of the further rule and practice among reliable and substantial business men and commercial houses to accept no check or draft from strangers upon parting with valuable consideration therefor, and this practice is particularly applicable to the instant case for the reason that Stitt was a stranger to the original contract and from the evidence of himself on the witness stand it appears that he made claim to a delivery of these sheep by virtue of a contract with a third party, Hatcher & Snyder, who are also strangers to the original transaction.

The conclusion of part (A) of plaintiff's argument illustrates the underlying fallacy of his entire reasoning, to-wit: It assumes that these defendants obstructed and hindered this plaintiff, and "refused to give him a chance" to perform the obligation which the law imposed upon him. The answer to the whole contention is simply that not only does the record fail to sustain him, but the record discloses that these defendants acted straightforward and upright and upon every turn when the question presented itself stood fairly and squarely upon their contract and required nothing more nor less on the part of plaintiff than the performance of the obligation which was undertaken in the contract and which the law imposed upon him.

It is insisted by defendants that time is of the essence of this contract and as the act on the part of

plaintiff consisted in the payment of money only, it must have been performed immediately upon the thing to be done being exactly ascertained.

Section 5046 and 5047, R. C. Mont.;
Snyder et al. v. Yarbrough, 43 Mont. 203, 150 Pac. 411;
Fratt v. Daniels-Jones et al., supra.

At law time was always of the essence of the contract. True, Chancellor Lord Thurlow is said to have held that in equity time could not be made of the essence of a contract. See Gergson vs. Riddle referred to by Mr. Romlily in arguing the case of

Seton v. Slade, 7 Ves. 268,

but the court refused to apply the doctrine in Seton vs. Slade and it has been overthrown in England and has never been favorably received in this country. See

Hudson v. Bartran, 3 Madd. 447;
Note to Jones v. Robbins, 50 Am. Dec. 597 and authorities;
Hollingsworth v. Frye, 4 Dalls. 345, Fed. Case No. 6619;
Jennings v. Bowman (S. C.) 91 S. E. 731.

PAYMENT OF OBLIGATION MUST BE IN MONEY.

The contract provides that payment shall be at the time and place of delivery. Where a party has not

expressly agreed to accept payment in something other than money he may enforce his just claim by a money judgment unless he has in some way estopped himself or legally waived his right to demand payment in money. It needs no positive agreement to pay in money to entitle a creditor to demand money, for the law decrees that the payment shall be in money.

Elliott on Contracts, Section 1926.

> "Where the contract is silent as to the character of the money or currency in which the payment is to be made, payment may be made in any currency which constitutes a legal tender at the time of payment. On the other hand, in the absence of an express stipulation to the contrary, the creditor is not bound to receive anything but legal tender money in payment."

22 Am. & Eng. Ency. of Law, 539;

Howe v. Waide, 4 McLean 319;

Paup v. Drew, 10 Howard (U. S.), 218;

Trigg v. Drew, 10 Howard (U. S.), 224;

Bome v. Torry, 16 Ark. 83;

Moore v. Morris, 20 Ill. 255;

Galena Ins. Co. v. Kupfer, 28 Ill. 332;
81 Am. Dec. 284;

Hancock v. Yaden (Ind.), 16 Am. St. Rep. 396, 23 N. E. 253;

Vansickle v. Ferguson (Ind.), 23 N. E. 858;

Borne v. Indianapolis Bank (Ind.), 18 Am. St. Rep. 312, 24 N. E. 173;

Farmers L. & T. Co. v. Canada, etc., Ry. Co. (Ind.), 26 N. E. 784;

Martin v. Bott (Ind.), 46 N. E. 151;

Downing v. Dean, 3 J. J. Marsh (Ky.), 378;

Lord v. Burbank, 18 Me. 178;

Bull v. Harrell, 7 Howard (Miss.), 9.

In Hancock vs. Yaden, supra, the Supreme Court of Indiana said in considering the question as to the medium of payment of an employee for services rendered:

> "The case before us affords an example, for where a man, upon request, performs services for another, the law implies that he shall be paid for them, and paid in money. It needs no positive agreement to pay in money to entitle a creditor to demand money, for the law decrees that the payment shall be in money."

Fell v. H. Fell Poultry Co. (N. J.), 55 Atl. 236;

Haskins v. Derrin (Utah), 56 Pac. 953, acc.

Some more recent decisions to the same effect are the following:

Van DeVanter v. Redelshemier (Wash.), 107 Pac. 847;

S. Joli v. Hagensen (N. D.), 122 N. W. 1008;

McCormick v. Obanion (Mo.), 153 S. W. 267;

Goodwin v. Heckler (Pa.), 97 Atl. 475;

Moore v. Kiff, 78 Pa., 96;

Smith v. Foster, 5 Ore. 441.

"Readiness and willingness to pay is not enough; there must be a tender of the money."

Moore v. Kiff, supra;

Smith v. Foster, supra;

Sections 4903, 4939, 4938, R. C. Mont., acc.

An analysis of the Code provisions last above cited with section 4904, R. C. Montana, lend themselves to the proposition that delivery of the sheep and payment therefor were concurrent conditions; that is the intent evinced in the contract. Therefore upon tender of the sheep upon the last day provided therefor defendants were entitled to the money.

Cole v. Swanston, 1 Cal. 42, 52 Am. Dec. 288;
Ziehen v. Smith, (N. Y.) 42 N. E. 1080.

"When goods are sold and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded on payment of the price, 'but the buyer,' as is observed by Mr. Justice Bayley in

Bloxan v. Sanders, 4 B. & C. 948, 7 D. & R. 405,

'Has no right to have the possession of the goods until he pays the price.'"

Wilmshurst v. Bowker, 2 Man. & G. 792, 133 Eng. Rep. 965, by Tindal, C. J.

FORFEITURE OF DEPOSIT OF EARNEST MONEY.

As hereinbefore submitted, the case of Clifton vs.

Willson (Mont.), 132 Pac. 424, supra, ought to be controlling in this case, for under this decision no right to the amount deposited in earnest to bind the bargain can be had by plaintiff. He is seeking to recover his advance payments as a part of the compensation to him and by so doing the plaintiff assumes to stand strictly on his legal rights—risking his chance of ultimate recovery exclusively upon his alleged ability to show that his loss has been due to defendants' failure to deliver the ewes according to his agreement. His cause stands or falls upon his failure to show a breach of contract on part of defendants.

It is a generally established principle that where a deposit is made by the purchaser on a contract of sale and the day of performance is set at a future time, if, when the day of performance arrives, the purchaser is in default and thereby his contract is breached, he is not in a position to take advantage of his own wrong to recover the deposit originally made on the contract and the great weight of authority in this country is to the effect that neither a court of law nor a court of equity will permit the buyer under such circumstances to recover the deposit money so paid.

A. *Federal Courts.*

Hansbrough v. Peck, 5 Wallace (72 U. S. 497);
Kane v. Jenkinson, Fed. Case No. 7607.

B. *California.*

Rayfield v. Van Meter, 52 Pac. 666;

San Francisco Commercial Agency v. Widemann, 124 Pac. 1056, citing section 1439, C. C. Cal., identical with section 4903, R. C. Montana.

C. *Illinois.*

Colvin v. Weedman, 50 Ill. 311.

D. *Indiana.*

Patterson v. Coats, 8 Blackf. 500 (distinguished in that seller had elected to rescind the contract prior to date of delivery);

Harris v. Bradley, 9 Ind. 166.

E. *Iowa.*

Stevens v. Brown, 14 N. W. 735.

F. *Kansas.*

Gibbons v. Hayden, 44 Pac. 445.

G. *Nebraska.*

Walter v. Reed, 52 N. W. 682;

Scott v. Spencer, 60 N. W. 892;

H. *New York.*

Moskowitz v. Schwartz, 126 N. Y. S. 632;

Ajello v. Albrecht & Meister Co., 142 N. Y. S. 499.

In concluding, we quote from Gibbons vs. Hayden, supra:

> "The fact that counsel have not cited a single authority in support of their contention is quite conclusive evidence of the fact that their position is not well taken. On the contrary, the rule seems to be well settled that the party who has advanced money in part performance of such

an agreement—the other party being ready and willing to perform on his part—cannot, without just cause or excuse, refuse to proceed with the contract, and recover back what he has advanced," citing authorities.

Turning to subdivisions B, C, D, and E of plaintiff's brief, in answer thereto it may be said that however desirable it might be on behalf of plaintiff, the law does not require the obligee entitled to money to accept in lieu thereof a mere chose in action, whether this be in the form of a written obligation on the part of a third person as by his check or draft, or whether it be a guaranty on the part of a fourth person that the promise by the third person will be fulfilled. An offer of a bank check for the amount due is not a good tender.

Larson v. Breene (Colo), 21 Pac. 498;
Barber v. Hickey (D. C.), 24 L. R. A. 763;
Hardy v. Commercial Loan Co., 84 Ill. 251;
Sloan v. Petri, 16 Ill. 262;
Collier v. White (Miss.), 6 So. 618;
Te Poel v. Shutt (Neb.), 78 N. W. 288;
Matter of Collyer, 108 N. Y. S. 600;
Volk v. Olson, 104 N. Y. S. 415;
Ugland v. Bank (N. D.), 137 N. W. 572 (option waived);
Realty Co. v. Brown (Okla.), 147 Pac. 318;
Aldrach v. Light Etc. Co. (S. C.), 85 S. E. 164;
Gunby v. Ingram (Wash.), 106 Pac. 495.

The same rule extends to drafts.

Shay v. Callanan (Ia.), 100 N. W. 55.

and certificates of deposit,

Graddle v. Warner (Ill.), 29, N. E. 1118.

In regard to the proposed amendment to the complaint asked for by plaintiff (p. 36 his brief) it is respectfully submitted that "necessarily extending" the time for payment of the purchase price is exactly what neither the plaintiff nor the court can do without consent of defendants.

Section 4927, R. C., Montana, provides:

> "Performance of an obligation for the delivery of money only is called payment."

In answer to plaintiff's contention that Mr. Stitt could not reasonably be required to carry upon his person a sum approximating $30,000 in places "far from the protection that society affords in the city," (p. 31, plaintiff's brief) we wish to suggest that the legislature of this state has provided a means whereby this common law obligation which had theretofore rested upon obligors for the payment of money, namely; that an obligation to pay money could be met only by a tender and show of money at the time and place of performance, enacted section 4944, R. C. Montana (section 1500, Cal. C. C.):

> "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit, within

this state, of good repute and notice thereof is given to the creditor."

Not having brought himself within the provisions of section 4944, R. C. Montana, this plaintiff stands subject to the rules of the common law except as modified by the Codes of Montana.

Respectfully submitted,

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EDWIN L. NORRIS,
Attorneys for Defendants in Error.

Service of the foregoing brief and the receipt of a copy thereof are hereby admitted this.....day of October, 1918.

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Attorney for Plaintiff in Error.